

No. 15682

United States
Court of Appeals
For the Ninth Circuit

CLACKAMAS MEAT CO., INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Brief

Appeal from the United States District Court
for the District of Oregon

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Appeal from the United States District Court
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STATEMENT OF THE CASE

This action was brought by the United States to recover a portion of meat subsidy payments made to appellant during a period from May, 1945, through October, 1946. These subsidy payments were subject to recapture should it be determined later that appellant had violated any regulation of the Reconstruction Finance Corporation pertaining to livestock slaughter payments.

Appellant, a meat slaughterer doing business in Clackamas, Oregon, received subsidies to alleviate the price squeeze upon slaughterers caused by uncontrolled live cattle prices and controlled prices on meat.

These subsidies were paid under the following statutory and regulatory authority: Section 2(c) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. Section 2(e) of the Act above further provided that the subsidies should be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606 (b) (3). Meat was defined by the President as a "strategic or critical material"; that has the effect of empowering the Federal Loan Administrator under Section 2(e), with the approval of the President, to make a determination of the need for subsidy payments to producers of meat. Under the Stabilization Act of 1942, 56 Stat. 756, as amended, 60 U.S.C. App. (1946 Ed.) 961, et seq., as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Sta-

bilization was given overriding policy authority over all price and stabilization agencies. In carrying out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Livestock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to livestock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4241). Office of Economic Stabilization Directive 41 (10 F.R. 4494), as amended, effective April 24, 1945, also established the terms and conditions under which subsidy payments were made. By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

Section 5(d) of Regulation No. 3 (8 F.R. 10826) and Section 7003.9(d) and subsection (e) added thereto by Amendment No. 3 (10 F.R. 8073, 11153), of Revised Regulation No. 3 (10 F.R. 4241) provide that, upon a finding by the administrative agency

that the claim which had been preliminarily approved was invalid, or defective, it had the right to require restitution in whole or in part.

Facts of This Case.—In October of 1946, certain of appellant's books and records were investigated by a man purporting to represent the Portland Loan Agency of the Reconstruction Finance Corporation, and based on this investigation the RFC issued two letter orders dated December 18, 1947. One letter order was a demand for payment of an Inventory Recapture Claim Réceivable in the amount of \$147.90 (R. 8-9)¹. The other letter order was a demand in the amount of \$16,409.84 for refund of meat subsidies previously paid and now disallowed (R. 9-10).

The Government filed the present complaint on April 24, 1956, to reclaim the subsidy payments disallowed by the RFC (R. 3-6). Appellant filed its answer on August 13, 1956 (R. 10-12); admitting that it owed the Inventory Recapture Claim Receivable in the amount of \$147.90; denying that it had failed to preserve records supporting subsidy claims, and alleging as its First, Further and Separate Answer and Defense that appellant had protested the orders of December 18, 1947, issued by RFC, and that there has been no determination of appellant's protests, as required by law. On October 1, 1956,

1. References to the Transcript of Record printed on the appeal will be designated "R. ____".

the Government filed a reply denying each and every allegation contained in appellant's answer (R. 13-14). On March 25, 1947, the Government filed, together with a memorandum and affidavit, a Motion To Stay Proceedings "pending the outcome of an administrative appeal heretofore granted appellant by RFC" (R. 14-19). Although it does not appear in the Transcript of Record, the Affidavit of Thomas B. Brand, Assistant United States Attorney for the District of Oregon, indicates that the District Court granted the Government's Motion To Stay Proceedings (R. 20-21). On May 27, 1957, the Government filed a Motion for Summary Judgment supported by Affidavit of Thomas B. Brand (R. 19-20). The District Court granted the Government's Motion for Summary Judgment, and on June 10, 1957, entered a Judgment Order thereon in favor of the Government (R. 22). On June 20, 1957, Appellant moved for an order setting aside the judgment (R. 23-24). Appellant's motion was denied, and on July 10, 1957, appellant filed Notice of Appeal together with Cost Bond on Appeal.

STATUTES INVOLVED

The applicable statutes are set forth in pertinent part in the Appendix, *infra*, pp. 15-16.

SPECIFICATION OF ERROR

1. In this action by the Government to recover meat subsidy payments determined to be due it by

orders of the Reconstruction Finance Corporation, the District Court erred in entering summary judgment in favor of the Government.

SUMMARY OF ARGUMENT

The District Court improperly granted appellee's motion for summary judgment and improperly entered judgment for appellee.

There was a material fact question at issue before the court which could not be resolved by summary judgment.

Appellant alleged in its answer that it had protested the RFC's letter orders of December 18, 1947 (R. 11). Appellee, in its reply, denied this (R. 13). A material question of fact was put in issue by the pleadings. On plaintiff's motion for summary judgment, allegations of the answer must be taken as true, and unless it appears with absolute certainty that defendant is not entitled to relief upon any theory, the request for summary judgment should be denied.

The matter in issue is material because a protest of the letter orders of December 18, 1947, would still be before the RFC², and the District Court would have no jurisdiction to hear the case. Once the court has determined there is a material question of fact

2. RFC was dissolved, effective at the close of June 30, 1957, and its functions in connection with the matters at issue were transferred to the Administrator of the General Services Administration, pursuant to the provisions of Reorganization Plan No. 1 of 1957, July 2, 1957, 22 F.R. 462.

at issue between the parties, it has determined that entry of summary judgment is not proper. The District Court had no authority under its summary judgment powers to resolve this material question of fact in favor of plaintiff and award judgment.

The case should be reversed and remanded with instructions to grant a trial so that the material question of fact at issue may be determined.

ARGUMENT

Appellee Was Not Entitled to a Summary Judgment Because There Was a Genuine Issue in This Case as to a Material Fact.

A. For Appellee to Be Entitled to a Summary Judgment, There Must Not Be a Genuine Issue as to Any Material Fact and Appellee Must Be Entitled to a Judgment as a Matter of Law.

Appellee moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, Title 28, U.S.C.A. The pertinent subsections of Rule 56 are as follows:

“SUMMARY JUDGMENT RULE 56(a) FOR CLAIMANT.

A party seeking to recover upon a claim, counterclaim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As

amended December 27, 1946, effective March 19, 1948.

56(c) MOTION AND PROCEEDINGS THEREON.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended December 27, 1946, effective March 19, 1948."

A reading of Rule 56(c) indicates that it must be shown that there is no genuine issue as to any material fact *and* that the moving party is entitled to a judgment as a matter of law. Quoting from "Notes of Advisory Committee on Rules" which follows Rule 56 in Title 28, U.S.C.A.:

"Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact."

The procedure for summary judgment is intended to expedite settlement of litigation where it affir-

matively appears upon the record that in the last analysis there is only a question of law as to whether a party should have judgment in accordance with the motion for summary judgment, and, if there is any question of fact presented on the record in the proceedings for summary judgment, the motion cannot be sustained. *Burley v. Elgin, J. & E. Ry. Co.*, 140 F. (2d) 488 (C.A.7), affirmed 65 Sup. Ct. 1282, 325 U.S. 711, 89 L. Ed. 1886, opinion adhered to 66 Sup. Ct. 721, 327 U.S. 661, 90 L. Ed. 928.

Rule 56 concerning summary judgment was not intended to deprive litigants of a right to a full hearing on the merits if any issue of fact exists and was not intended to be used as a substitute for a regular trial where the outcome of the litigation depends upon disputed questions of fact. *Michel v. Meier*, 8 F.R.D. 464 (D.C. Pa.); *Chappel v. Goltsman*, 185 F. (2d) 215 (C.A. 5); *Dulansky v. Iowa Illinois Gas & Electric Co.*, 191 F. (2d) 881 (C.A. 8); *Chemical Foundation v. Universal-Cyclops Steel Corporation*, 2 F.R.D. 283 (D.C. Pa.).

The trial judge should be slow in passing upon a motion for summary judgment which would deprive a party of a right to trial by jury where there is reasonable indication that a material fact is in dispute. *Aetna Insurance Company v. Cooper Wells & Company*, 234 F. (2d) 342 (C.A. 6).

Summary judgment may not be granted under Rule 56 if there be an issue presented as to the

existence of any material fact, and all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment. *Sarnoff v. Ciaglia*, 165 F. (2d) 167 (C.A. 3); *Eastern Brass & Copper Co. v. General Electric Supply Corp.*, 101 F. Supp. 410 (D.C. N.Y.); *American Optical Co. v. New Jersey Optical Co.*, 58 F. Supp. 601 (D.C. Mass.).

Upon a motion for summary judgment it is no part of the court's function to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016 (C.A. 3).

United Meat Co., Inc. v. Reconstruction Finance Corporation, and *Federated Meat Corporation v. Reconstruction Finance Corporation*, 174 F. (2d) 528 (C.A. D.C.), are companion cases in which two meat slaughterers sued the RFC for subsidy payments withheld. The RFC, in its answer, alleged that the plaintiffs had violated substantive provisions of the Office of Price Administration; the plaintiffs, in their replies, denied that they had violated O.P.A. regulations and also asserted that the court had no jurisdiction to make a determination. The court held that there was a genuine issue of fact and summary judgment was denied.

B. There Was a Genuine Issue Raised in This Case as to a Material Fact.

Appellant, as a part of its answer, alleged in its First, Further and Separate Answer and Defense (R. 11), as follows:

"I.

Following the issuance of the purported orders of December 18, 1947, defendant duly protested said purported orders.

II.

There has been no determination of defendant's protests, as required by law."

Appellant's affirmative defense quoted above was denied by appellee in its reply as follows:

"I.

With regard to defendant's First, Further and Separate Answer and Defense, plaintiff denies each and every matter, allegation and thing therein contained." (R. 13).

The above excerpts from the pleadings clearly raised a genuine issue as to a material fact. This issue has never been properly disposed of and should be tried before a jury. Appellant alleged that it had protested the letter orders of RFC dated December 18, 1947. Appellee denied that the orders had been protested. This was a genuine issue as to a material fact.

The fact at issue was material because if appellant has in fact protested the letter orders of RFC, and RFC has made no determination of appellant's protests, as required by law, then the protests are still before RFC and the District Court has no jurisdiction to hear appellee's claims.

Section 203(a) of the Emergency Price Control Act of 1942 (56 Stat. 31) (58 Stat. 638) (50 U.S.C. App. 923) is as follows:

“Sec. 203(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evi-

dence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

It is appellant's defense, raised by its First, Further and Separate Answer and Defense, that pursuant to Section 203(a) of the Act above appellant filed protests to the orders of the RFC and that the Administrator of the RFC has failed to make determination of appellant's protests as required by Section 203(a) of the Act. The protests are still pending before RFC; therefore the District Court has no jurisdiction to hear appellee's claims. It is a complete defense to the Government's action.

What the Government sought, on belatedly realizing that it could not prove an essential element of its case, and could not disprove a fact which constituted a defense, was to force the appellant to appeal when it had nothing from which to appeal, and require appellant to undertake to disprove that it owed the moneys which the Government claimed.

The applicable statute (§203(a) of the Emergency Price Control Act of 1942), (56 Stat. 31), (58 Stat. 638), 50 U.S.C. App. 923) required the Administrator, in the event he denied such a protest as appellant alleges that it filed, to inform the protestant of the

grounds upon which such decision was based, and of any economic data and other facts of which the Administrator had taken official notice. It was from such a decision that appellant would have had a right of appeal.

The appellant alleged, and it appears that the Government almost concedes (R. 18), that the appellant duly filed protests against 1947 orders. In 1957, the Government sought to force appellant to prosecute an appeal with respect to such protests, when the decision required by the Statute had never been rendered.

CONCLUSION

Appellant respectfully submits that the judgment order should be reversed.

Respectfully submitted,

MAGUIRE, SHIELDS, MORRISON
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WALTER J. COSGRAVE,

H. KENT HOLMAN,

Attorneys for Appellant.

APPENDIX

Rule 56 of the Federal Rules of Civil Procedure,
Title 28 U.S.C.A.:

“SUMMARY JUDGMENT RULE 56(a) FOR CLAIMANT.

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